

accept the trial judge's finding.

As regards the antecedent beatings alleged by the appellant, although his evidence was not contradicted in terms it is difficult to see how any reliance could be placed upon it. Apart from such minor difficulties as that when asked to account for the absence of bruises on his person as a result of injuries he had suffered he said he was struck on the stomach only, which was not what he had said earlier, and that no efforts seem to have been made to call any evidence from the Johore hospital as to his being treated there, there was the change in his story which went to the root of it. He started by saying that he made a statement while he was upset by previous ill-treatment and as a result of a threat; then he completely changed his story and said he did not make any statement at all. It is axiomatic when a witness is proved to have spoken untruthfully on one or two points the whole of his evidence is not necessarily discredited. It is, however, a different position where, as here, a witness while in the witness box changes the whole nature of his evidence regarding the fundamental matter on which he is giving evidence.

In our view the statement was properly admitted. We would, however, add that we are satisfied that had it been wrongly admitted either by reason of having been obtained by improper means or by reason of not having been made at all the case would clearly fall within the proviso to section 60(1) of the Courts of Judicature Act, 1964, for in our view no reasonable judge after properly directing himself could have failed to convict the appellant on the rest of the evidence to which no objection could be taken (see *Stirland* ⁽³⁾).

The appeals are dismissed.

Appeals dismissed.

TAN SEE BOON v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and Suffian J.) December 28, 1965]

[K.L. — Federal Court Criminal Appeal No. X4 of 1965]

Internal Security — Possession of firearms and ammunition — Consorting with members of Indonesian armed forces — Evidence of Indonesian military personnel — Treated as evidence of accomplices — Allegation that accused had changed intention and formed innocent intention to go home — Admissibility of statements — Courts of Judicature Act 1964, s. 60(1) — Internal Security Act, 1960, ss. 57(1) & 58(1).

Internal Security — Security area — Whether airspace forms part of.

The appellant was convicted on three charges of consorting with Indonesian armed forces possession of a rifle and possession of ammunition. It was alleged that he took part in the Indonesian invasion near Labis during the night of 1st/2nd September, 1964. The grounds of appeal were (1) that whatever the appellant did that might be regarded as unlawful was done in the

A airspace above Johore and that there was a complete lack of criminal intention on the part of the appellant because when he was in the airspace he did not know that he was over Malaysian soil; (2) that the appellant after landing from the aircraft had changed any previous intention which might be inferred from the circumstances of his presence in the aircraft and had formed a new and wholly innocent intention to go home; (3) that the appellant had been convicted on the uncorroborated evidence of accomplices and that the trial judge's reasons for this were unsatisfactory; (4) that the appellant's statement to the police was wrongly admitted in evidence, because he had been subjected to threats and questioning for intelligence purposes before the statement was recorded.

B Held: (1) in view of the decision of *Tan Hua Lam v. Public Prosecutor*,⁽¹⁾ the first ground of appeal could not succeed;

C (2) there was no evidence of any change of heart on the part of the appellant prior to the time after his landing on Malaysian soil when he failed to make contact with his companions and in any event a mere change of intention on the part of the appellant cannot afford a ground of defence;

D (3) in the circumstances of this case the judge was justified in relying on the evidence of the Indonesian soldiers and even if they are to be treated as accomplices, he gave forceful reasons for accepting their uncorroborated evidence;

E (4) the statement of the appellant was in the circumstances wrongly admitted but the case fell clearly within the proviso to section 60(1) of the Courts of Judicature Act because no reasonable judge could have failed to convict the appellant on the rest of the evidence and so there was no miscarriage of justice.

Cases referred to:—

(1) *Tan Hua Lam v. Public Prosecutor* [1966] 1 M.L.J. 147.

(2) *Law Kiat Lang v. Public Prosecutor* [1966] 1 M.L.J. 215.

F (3) *Wong Pooh Yin v. Public Prosecutor* [1954] M.L.J. 189.

(4) *R. v. Lynch* (1903), 19 T.L.R. 163; [1903] 1 K.B. 444.

(5) *R. v. Stirland* (1944), 30 Cr.App.R. 40, 46.

FEDERAL COURT.

T. T. Rajah for the appellant.

G *Nik Saghir bin Mohamed Noor* (Deputy Public Prosecutor) for respondent.

Cur. Adv. Vult.

H Thomson L.P.: This is another appeal arising out of the Indonesian invasion near Labis during the night of 1st/2nd September, 1964, with which we were concerned in the cases of *Tan Hua Lam v. Public Prosecutor*⁽¹⁾ and *Law Kiat Lang v. Public Prosecutor*.⁽²⁾

I On the morning of 2nd September the present appellant was arrested near Labis and he was thought to have been one of the armed party commanded by Lieutenant Sutikno who had left by parachute the aircraft which figured in the previous two cases. In consequence he was prosecuted on the following three charges under the Internal Security Act, 1960:—

"1st Charge: That you between 2.00 a.m. and 10.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide

Federal L.N. 245 of 17th August 1964, namely Kampong Sekari, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian armed forces who carried firearms and ammunition in contravention of the provisions of section 57(1) of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian armed forces in a manner prejudicial to public security and that you have thereby committed an offence punishable under section 58(1) of the Internal Security Act, 1960.

2nd Charge: That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 245 dated 17th August, 1964 namely at Kampong Sekari, Labis, in the District of Segamat, in the State of Johore, without lawful excuse carried a firearm to wit, one rifle, without lawful authority and that you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960.

3rd Charge: That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide Federal L.N. 245 dated 17th August, 1964, namely at Kampong Sekari, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had in your possession ammunitions to wit, 200 rounds of .308 ammunition and two handgrenades, without lawful authority and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960."

In the event the appellant was convicted on all three charges and sentenced to death.

Against these convictions he has now appealed.

The circumstances in which the appellant was arrested on 2nd September have at no time been in dispute. About 9 a.m. that day constable Ramli went to a road near Labis leading from the jungle. There he saw the appellant who was wearing shorts but nothing on his body and another man; he arrested the other man but the appellant ran away. Shortly afterwards two labourers, Hashim and Mohamed, were working in their rice fields nearby when they saw the appellant and caught him and took him to the Kampong Tenang police post. Nothing incriminating was found in his possession.

The prosecution evidence against the appellant consisted mainly of that of Lieutenant Sutikno and two other Indonesian soldiers who were members of the party in the aircraft.

Lieutenant Sutikno said he had joined the Indonesian army in 1945 and had been a member of the air force since 1950. In 1964 he was trained for the "Crush Malaysia" campaign and in July that year he was sent to Karimun Island (in Indonesia) to give military training to Malaysians for the purpose of "confrontation". On 1st September he was ordered to take a party of parachute troops to Malaysia for purposes of sabotage. The party consisted, in addition to himself, of 23 Indonesians and 14 Malaysians, two of them women, and the appellant was one of the party. They left Jakarta about 4.30 p.m. on 1st September and landed at Medan. They

A left Medan at midnight and about 2 a.m. on 2nd September proceeded to leave the aircraft by parachute, the witness jumping first. Later he was captured and had at all times been treated as a prisoner of war. The appellant was one of the Malaysians in the party and his "jumping number" was 45. Each member of the party was carrying a sten gun or a rifle, two grenades and a quantity of ammunition and each of them was supplied with \$300 Malaysian currency in \$1 notes.

Karma Omar said he was a soldier in the Indonesian army and was in charge of a section of six men in the armed party commanded by Lieutenant Sutikno. The appellant was one of his section and was armed with a Lee Enfield rifle, two grenades and a quantity of ammunition. On the evening of 1st September they left Jakarta and flew to Medan. After a short stay they left Medan and at that time they did not know their destination. They were then carrying their parachutes and were each given \$300 in Malaysian \$1 notes wrapped in plastic. They left the aircraft by parachute. The witness whose number was 43 did not actually see the appellant, who was 45, jump but said that if he had not done so he would have been thrown out and in any event he saw him later at the Labis police station. It was after he landed that the witness realised he was in Malaysia. He was captured and was at one time prosecuted for possession of arms but the charge against him was withdrawn and he was treated as a prisoner of war.

F Sutisna Utja said he also was a soldier in the Indonesian army. He was one of the section led by Karma Omar which was part of Lieutenant Sutikno's party. The appellant was a member of the same section and was carrying a rifle, ammunition and two grenades. The party left the aircraft about 1 a.m. on 2nd September. The appellant's "jump number" was 45 and the witness, whose number was 48, actually saw the appellant leave the aircraft. The witness was captured and later saw the appellant at Johore Bahru. He himself was at one time prosecuted for possession of arms but the charge against him was withdrawn and he was treated as a prisoner of war.

The only other evidence against the appellant was a statement which he made to a police officer on 3rd September, the day after his arrest. In this he said he had gone to Indonesia for military training, one of the objects of which was to overthrow the Malaysian Government which had refused to meet the demands of the party of which he was a member. The statement then described his training in Indonesia and gave an account of the expedition of 1st/2nd September which did not differ from that given by the Indonesian witnesses. After he landed

he decided to return home and discarded his arms and ammunition and the Indonesian uniform he was wearing.

In the course of the prosecution case the appellant gave evidence of having been subjected to ill-treatment by intelligence officers after his arrest in support of an objection to the admissibility of the statement he made to the police. But at the close of the prosecution case when the alternative methods of making his defence were explained he elected to make a brief statement from the dock not on affirmation. All he said was this:—

"I lived at Bagan Serai, Perak. I am an odd job labourer. I did not commit any offence. I came from Pahang to Labis. At the point I was arrested I had nothing with me. As such I did not commit any offence. That is all. I am not calling any witness."

In the event Azmi J. convicted the appellant on all three charges for reasons which he has set out in a long and careful judgment. It is clear that he based his decision on the evidence of the Indonesian prisoners of war. He treated their evidence as that of accomplices. He warned himself of the danger of convicting on such evidence in the absence of corroboration and was of the opinion that there was no corroboration, but for reasons which he stated and to which we shall return, he accepted their evidence. He considered the appellant's statement to the police but held that even if it were true that by the time of his arrest the appellant had formed an intention of returning peacefully to his home that afforded no ground of defence. Finally he considered the appellant's unsworn statement from the dock. He expressed surprise that anyone should be travelling from Pahang clad only in a pair of shorts and he found nothing in that statement which raised any reasonable doubt as to the truth of the prosecution case.

Before us the convictions have been attacked on a number of grounds with some of which it is not necessary to deal at length.

In the first place they were attacked on the grounds that whatever the appellant did that might be regarded as unlawful was done in the airspace above Johore which was not part of a security area and that there was a complete lack of any criminal intention on the part of the appellant because when he was in the airspace in question he did not know he was over Malaysian soil but was under the impression that he and the party of which he was a member were on a training flight in Indonesia and were not engaged in a hostile invasion. Counsel for the appellant, though he did not abandon these grounds, did not press them in view of our decision in the previous case of *Tan Hua Lam v. Public Prosecutor*, *supra*.

There are, however, three grounds of appeal, or rather three groups of grounds of appeal,

A which merit consideration.

The first of these is that the trial judge was wrong in rejecting the defence that the appellant after landing from the aircraft had changed any previous intention which might be inferred from the circumstances of his presence in the aircraft and had formed a new and wholly innocent intention to return home. In rejecting this as a defence he found support in the Privy Council case of *Wong Pooi Yin v. Public Prosecutor* ⁽³⁾ and in this, in our view he was right.

In that case the appellant had been convicted for possession of arms without lawful excuse in contravention of regulation 4(1)(a) of the Emergency Regulations, 1951. At his trial the defence had been set up that the accused had a lawful excuse for carrying firearms because he wanted and was waiting to surrender to the police. The judge withdrew this issue from the assessors and in the event the accused was convicted. On appeal the Court of Appeal held that the trial judge was right in saying that in the circumstances of the case the defence of lawful excuse was not available. The appellant appealed to the Privy Council and although his appeal was successful, Lord MacDermott referred (at p.190) to the following passage in which the Court of Appeal had referred to the appellant's defence as being:—

"tantamount to saying that a man can change the nature of his act, from an unlawful to a lawful one, by a mere change in his intention. That may be true of offences of which intention is an ingredient, but it is not true of offences to which the doctrine of 'absolute prohibition' applies."

His Lordship then said (at p.191):—

"In so far as this passage decides that a mere change of intention on the part of a person accused under regulation 4(1) cannot, in itself, constitute a 'lawful excuse', their Lordships are in agreement with it."

In any event it is abundantly clear that even on the showing most favourable to the present appellant there was on the evidence not even any suggestion of any change of heart on his part prior to the time after his landing on Malaysian soil when he failed to make contact with his previous companions.

Then the convictions were attacked on the ground that the appellant had been convicted on the uncorroborated evidence of accomplices and that the trial judge's reasons for this were unsatisfactory.

Azmi J. has set out in some detail his course of reasoning in this connection:

"I have no doubt that for the purpose of this trial the three Indonesians were accomplices. The law on this question is quite clear in that it is a practice which has almost the strength of law that a court should not convict on the evidence of accomplices unless such evidence is corroborated by independent evidence, but in

our law it is also provided under section 133 of the Evidence Ordinance that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. In my view there are several reasons why the evidence of an accomplice should be regarded with suspicion unless corroborated. One of the reasons is that an accomplice is likely to swear falsely in order to shift the blame from himself to another and that in so doing he expects leniency from the authorities, . . .

In this case, however although the three Indonesians are accomplices, one thing should be kept in mind — that they were members of the Indonesian armed forces and they came here by the order of the authorities in Indonesia. They are professional soldiers and they were merely obeying the orders of their superiors. I think I am entitled to make a distinction between them and the usual type of accomplices who normally give evidence in the court. These Indonesian witnesses were not personally responsible for accused's joining their party and parachuting into this country. It has been said in reference to the two soldiers that the charges against them have been withdrawn. I understand the reason why the charges were withdrawn was because this Government decided to treat them as prisoners of war according to the Geneva Convention. In other words, the withdrawal of charges against them has nothing to do with their willingness or undertaking to give evidence in this trial.

As to Lieutenant Sutikno, I understand that he has been treated very well because he collaborated with the Government in advising his men to surrender."

Throughout the trials arising from the Labis invasion it has been accepted that for the purposes of the law of evidence Indonesian prisoners of war are to be treated as accomplices. That assumption has not been questioned and it is no concern of ours to question it in the present case though it may be pertinent to observe that in the case of *The King v. Lynch* ⁽⁴⁾ a number of witnesses had fought against the British forces in South Africa and no suggestion was made at the trial that they were accomplices of the prisoner.

Nevertheless, even if that assumption be accepted, there is great force in the reasoning of Azmi J.

Various reasons have been stated as the basis of the modern rule relating to accomplice evidence. It has been said that *ex hypothesi* an accomplice is an infamous person and as such not deserving of belief. Again it has been said he has an obvious interest in diverting blame from himself to the person against whom he testifies. Again it has been said he has an obvious interest in currying favour with the authorities in whose hands his own fate lies. Yet again it has been said that by reason of his knowledge as an accomplice he is in a peculiarly favourable position to concoct plausible false evidence.

In our view, however, none of these considerations are very relevant in the present case. Here the accomplices are men who have done whatever they have done in the course of their duty as soldiers and are being treated as prisoners of war. They are entitled to the pro-

tection of international law and the Geneva Conventions relating to prisoners of war are part of the municipal law of this country (see Act No: 5 of 1962). They have nothing to fear and nothing to hope for save the end of hostilities which will permit their return to their homes. In particular they have no cause for animosity against any individual among their former comrades in arms who have the misfortune not to enjoy the protection they themselves enjoy. The trial judge has seen and heard these particular witnesses and has found no reason to doubt their credibility as individuals. In the circumstances it is not open to us to dissent from his conclusions as to their credibility.

The third ground of appeal with which we have to concern ourselves is that the appellant's statement to the police was wrongly admitted in evidence because it was elicited from him by threats and that in any event the statutory caution was not properly administered to him.

This statement was taken on the evening of 3rd September. The prosecution evidence was that the appellant was then detained at Labis police station where he had been taken after his arrest the previous day. On the afternoon of 3rd September he was interviewed by Inspector Hamid. This witness said he questioned the appellant for about two hours for intelligence purposes but denied that in the course of this questioning any threat or promise was uttered.

Superintendent Yeoh gave evidence that about 7.15 p.m. the same evening he saw the appellant at Labis police station with a view to taking a statement from him. Speaking through Corporal James Wong as interpreter he asked the appellant what language he wished to speak. The appellant said Hokkien. He then administered the form of caution provided by section 75 of the Internal Security Act which was interpreted to the appellant who appeared to understand it. He then asked the appellant questions to which the appellant gave replies which were interpreted into English by the interpreter and written down by the witness. The statement was then interpreted back to the appellant who said it was correct and said he wished to add nothing except to ask for leniency. He was satisfied that the statement was made voluntarily and at no time did he use threat, inducement or promise.

Corporal James Wong, the interpreter, gave similar evidence.

No suggestion of any threat or promises or indeed of any impropriety of any sort was made to either of these witnesses in cross-examination but Wong was cross-examined apparently with a view to making out that there was some possibility of misunderstanding between him and the appellant because they might have

been using different forms of the Hokkien dialect. Although an attempt was made by the defence to support this by calling a court interpreter as a witness the point was clearly without substance particularly as the appellant himself admitted he spoke the same sub-dialect.

The appellant himself gave evidence at this stage. His story was that after his arrest he was taken "to a certain place in a dark chamber". There a military officer and three other persons punched him and kicked him and asked him whether he was a paratrooper, which he denied. They then compelled him to make a statement. Then he was taken to the police station where he was questioned by the witness, Inspector Hamid. Later he was assaulted again and that night he only had two cups of Ovaltine as food.

The following day about noon he was taken into the jungle in a jeep by the three men who had beaten him the previous day to look for his gun and he was told that if he did not find it he would be beaten again on their return to the police station and that if he was not co-operative he would be killed and they would say he had been shot trying to escape. In the jungle they left the jeep and proceeded on foot but firing broke out and they hid in a bush. They then returned to the jeep to return to Labis and on the way a dead body was found and taken into the jeep. They got back to Labis as it became dark and the appellant was asked to identify the body of a dead woman and he was told that if he did not co-operate he would be like the dead body. It was shortly after that that he was interviewed by Superintendent Yeoh and made his statement. He had had no food and was frightened by reason of his previous experiences. He was not cautioned and he did not understand the interpreter very well. All he was told was that it would be better for him to speak. Subsequently he made no complaint of ill-treatment to anybody.

It is not really necessary for this court to examine that body of evidence because of the way in which it was regarded by the trial judge.

As regards the interview between Superintendent Yeoh and the appellant the judge accepted the evidence of Yeoh and his interpreter and rejected that of the appellant. That depended largely on the view the judge took of the credibility of the witnesses and we accept it without question. With regard to the events alleged by the appellant on 2nd September and on 3rd September prior to the statement being taken the judge took the view that much of the appellant's story was a fabrication. He thought, however, that some inducement might have been held out to the appellant to persuade him to show where his gun was hidden, though not to persuade him to make a statement. And he

A thought that if there had been any threat or inducement held out to the appellant the effect of it had been removed by the caution administered by Superintendent Yeoh.

B With respect we are unable to agree. We are prepared to accept that much of the appellant's evidence was exaggerated and a fabrication. Nevertheless if it contained any elements of truth, and the judge clearly thought it did, something should have been said in addition to the statutory statement to remove any impression that might have been made on the mind of the appellant by whatever had happened previously. C It may well be, of course, that Superintendent Yeoh had no knowledge of anything that might have happened previously but that is beside the point. And in any case, though it is easy to be wise after the event, it might have occurred to him that twenty-four hours had elapsed since the arrest of the appellant, that active operations were still going on in the neighbourhood and that in the circumstances it would have been wise to make enquiries with a view to ascertaining whether any additional caution was desirable. D

E In the circumstances, then, we must hold that the statement was wrongly admitted and to that extent the appeal succeeds. In our view, however, the case clearly falls within the proviso to section 60(1) of the Judicature Act because no reasonable judge could have failed to convict the appellant on the rest of the evidence and so there was no miscarriage of justice (see *Stirland* ⁽⁵⁾). And we are fortified in this view by a perusal of the grounds of judgment of Azmi J. From these it is clear that he based the convictions solely on the evidence of the Indonesian witnesses, which he believed, and that he only considered the appellant's statement with a view to ascertaining whether it supported a possible defence based on a portion of it which had been urged upon him. F

G The appeals are dismissed.

Appeals dismissed.

HOCK HIN CHAN v. NG KEE WOO

[F.C. (Thomson L.P., Ong Hock Thye F.J. and MacIntyre J.) December 28, 1965]

[Ipoh — Federal Court Civil Appeal No. 50 of 1965]

Bills of Sale — Prescribed form — Whether bill of sale can be made by partner on behalf of himself and his partners — Bills of Sale Ordinance, 1950, s. 6(b).

I This was an appeal against the decision of the High Court that a bill of sale executed by a judgment debtor in favour of the respondent was valid and that the claim of the appellant, an execution creditor, to the lorry which was the subject matter of the said bill of sale, failed. It was contended that the bill of sale was void as it was not in the form prescribed in the Bills of Sale Ordinance. The bill of sale was stated to be made by a firm and it was argued that a bill of sale cannot be made by partners or by one of the partners.